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No. 71-1131

In the Supreme Court of the United States

OCTOBER TERM, 1971

BERNARD HAMLET, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
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General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

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1. On March 12, 1971, petitioner filed an unfair labor practice charge against the Union,[1] alleging that the Union, his collective bargaining representative, had, for unfair and invidious reasons, refused to process his seniority grievance against the Com-

[1] Independent Petroleum Workers of America, Inc. (currently known as National Oil Workers Union, Local 1, Inc.). The charge alleged a violation of Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A).

pany.[2] The Board's Regional Director, after investigation, dismissed the charge on the ground that the Union's failure to process the grievance had not been for invidious or arbitrary reasons, but had been based on its judgment that the grievance lacked merit (Pet. App. A, pp. A-3 to A-4). Petitioner appealed to the General Counsel of the Board, and he sustained the findings of the Regional Director (Pet. App. A, pp. A-2 to A-3).[3]

Petitioner then filed a petition in the United States Court of Appeals for the Seventh Circuit, seeking review of the General Counsel's refusal to issue an unfair labor practice complaint. The Board moved to dismiss the petition on the ground that the General Counsel's refusal to issue a complaint is not a final order within the meaning of Section 10(f) of the Act, 29 U.S.C. 160(f).[4] The court of appeals granted

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[2] American Oil Company.

[3] The General Counsel found that the nine employees alleged to have been improperly granted higher seniority than petitioner had, in fact, qualified for such seniority under the collective bargaining agreement between the Company and the Union. Moreover, he noted that the investigation had revealed no animus by the Union against petitioner. Petitioner's suggestion that the General Counsel was not aware of his position at the time of the decision (Pet. 7-8) is unfounded. Petitioner had submitted to the General Counsel, in connection with the appeal, a signed statement explaining his position.

[4] Section 10(f) provides that: "Any person aggrieved by a final order of the Board granting or denying in whole or part the relief sought may obtain review of such order" in the appropriate court of appeals.

the motion and dismissed the petition (Pet. App. A, pp. A-1 to A-2).

2. The court below correctly dismissed the petition to review the General Counsel's refusal to issue an unfair labor practice complaint on his charge. Under Section 10(f) of the Act (n. 4, *supra*), a court of appeals has jurisdiction to review only a "final order of the Board." It is well settled that the action of the General Counsel in refusing to issue a complaint is not a "final order of the Board," within the meaning of Section 10(f). *Lincourt* v. *National Labor Relations Board*, 170 F.2d 306 (C.A. 1); *Manhattan Construction Co.* v. *National Labor Relations Board*, 198 F.2d 320, 321-322 (C.A. 10); *Anthony* v. *National Labor Relations Board*, 204 F.2d 832, 833 (C.A. 6); *Contractors Ass'n of Philadelphia and Eastern Pennsylvania* v. *National Labor Relations Board*, 295 F.2d 526 (C.A. 3), certiorari denied, 369 U.S. 813.[5]

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[5] Moreover, in view of the broad discretion conferred by Section 3(d) of the Act, 29 U.S.C. 153(d), the General Counsel's decision not to issue a complaint is not even reviewable by means of an independent suit in the district court. *Vaca* v. *Sipes*, 386 U.S. 171, 182; *Balanyi* v. *Local 1030, IBEW, and National Labor Relations Board*, 374 F. 2d 723, 726 (C.A. 7); *United Electrial Contractors Ass'n* v. *Ordman*, 366 F. 2d 776 (C.A. 2), certiorari denied, 385 U.S. 1026; *Hourihan* v. *National Labor Relations Board*, 201 F. 2d 187 (C.A.D.C.), certiorari denied, 345 U.S. 930.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

APRIL 1972.

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